Middy Industries Sdn Bhd & Ors v Arensi-Marley (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1500 OF 2010
RAMLY ALI, ZAHARAH IBRAHIM AND ANANTHAM KASINATHER JJCA
26 JULY 2012

Civil Procedure — Appeal — Striking out — Matter stemming from copyright infringement and passing off of designs — Notice of appointment for hearing of assessment of damages — Ex parte interlocutory injunction dismissed — Whether there was order of court directing assessment of damages — Whether right to enforce undertaking as to damages discretionary or automatic

This was an appeal against the decision of the High Court which allowed the respondent's application to strike out the appellants' notice of appointment for hearing of assessment of damages pursuant to an undertaking given by the respondent in respect of an ex parte interlocutory injunction which was dismissed. The respondent commenced an action against the appellants for copyright infringement and passing off of the respondent's designs for rain water gutter system. The respondent obtained an ex parte injunction order against the appellants with the undertaking of damages pending the hearing of the inter parte interlocutory injunction application. The respondent's inter parte interlocutory injunction application was dismissed by the High Court dismissed and was again dismissed upon appeal to the Court of Appeal. The appellants then filed a notice of appointment for hearing of assessment of damages pursuant to the orders of the High Court and the Court of Appeal, both of which are in respect of the dismissal of the respondent's application of an interlocutory injunction. The respondent applied to strike out the appellants' said notice on the grounds that there was no order of the court directing assessment of damages and that the right to enforce an undertaking as to damages was discretionary and not automatic.

Held, dismissing the appeal:

(1) The appellants' application to issue a notice of appointment for the hearing of assessment of damages in the present case is clearly and obviously unsustainable and an abuse of the process of the court in the context of O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 (see para 29).

(2) The enforcement of the said understanding given by the respondent in an ex parte interlocutory injunction was not automatic right of the

respondent in the event the injunction is subsequently discharged. There must first be determination by the court that the undertaking ought to be enforced and an order from the court as to damages for which the court may order damages summarily or direct an assessment. Without such an order from the court, the undertaking cannot be enforced. The court may exercise its discretion and form an opinion that the appellants had sustained injury or damages as a result of the ex parte injunction (see para 17).

(3) The High Court and the Court of Appeal orders had merely dismissed the inter parte injunction application but did not in any way discharge or set aside the ex parte order granted earlier. The High Court and the Court of Appeal did not exercise their discretion to make an order directing an assessment of damages. The appellants did not apply for the ex parte order to be discharged or set aside. The fact that the ex parte order lapsed after 21 days, did not mean that the appellants were automatically entitled to damages (see para 20).

(4) The question of 'serious miscarriage of justice' did not arise if the appellants had taken the correct steps in enforcing the said undertaking as to damages as stated in the earlier ex parte order on the ground that the ex parte order was wrongly granted or it should not have been granted at all in the first place (see para 24).

(5) The ex parte order may have lapsed after 21 days; however the appellants could still proceed to make the application after it has lapsed. The application must be supported by an affidavit-in-support. If the application was allowed and the said ex parte order was discharged, revoked or set aside by the court, the appellants must then establish that they have suffered damages as a result of the said ex parte order. The court would then decide on the issue. The judge might then proceed to quantify the amount of damages suffered at the hearing of the same application or may make an order that the damages be assessed either by himself or by the Registrar at a later date. Only with this order, that the appellants could issue a notice of appointment for the hearing of assessment of damages (see para 25).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan Mahkamah Tinggi yang telah membenarkan permohonan responden untuk membatalkan notis pelantikan mendengar taksiran ganti rugi menurut akujanji yang diberikan oleh responden berkaitan injunksi interlokutori ex parte yang telah ditolak. Responden telah memulakan tindakan terhadap perayu-perayu kerana pelanggaran hak cipta dan kelirupaan reka bentuk responden untuk sistem longkar air hujan. Responden telah memperoleh perintah injunksi ex parte terhadap perayu-perayu dengan akujanji ganti rugi sementara menunggu

A selesai perbicaraaan permohonan injunksi interlokutori inter parte. Permohonan injunksi interlokutori inter parte responden telah ditolak oleh Mahkamah Tinggi dan sekali lagi ditolak atas rayuan kepada Mahkamah Rayuan. Perayu-perayu kemudian telah memfailkan notis pelantikan untuk perbicaraan taksiran ganti rugi menurut perintah-perintah Mahkamah Tinggi B dan Mahkamah Rayuan, kedua-duanya yang berkaitan penolakan permohonan injunksi interlokutori responden. Responden telah membatalkan notis perayu-perayu tersebut atas alasan-alasan bahawa tiada perintah mahkamah yang mengarahkan taksiran ganti rugi dan bahawa hak untuk menguatkuasakan akujanji berhubung ganti rugi itu adalah atas budi bicara C dan bukan secara automatik.

Diputuskan, menolak rayuan:

(1) Permohonan perayu untuk mengeluarkan notis pelantikan untuk D perbicaraan taksiran ganti rugi dalam kes ini adalah jelas dan nyata tidak boleh dikekalkan dan satu penyalahgunaan proses mahkamah dalam konteks A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 29).

(2) Penguatkuasaan persefahaman tersebut yang diberikan oleh responden E dalam injunksi interlokutori ex parte bukan hak automatik responden sekiranya injunksi itu kemudiannya dibenarkan. Pertamanya mahkamah perlu menentukan bahawa akujanji itu patut dikuatkuasakan dan satu perintah daripada mahkamah berhubung ganti rugi yang mana mahkamah boleh memerintahkan ganti rugi terus atau mengarahkan F taksiran. Tanpa perintah sedemikian daripada mahkamah, akujanji itu tidak boleh dikuatkuasakan. Mahkamah boleh melaksanakan budi bicaranya dan membentuk pendapat bahawa perayu-perayu telah mengalami kerugian atau kehilangan akibat injunksi ex parte itu (lihat perenggan 17).

G

(3) Perintah-perintah Mahkamah Tinggi dan Mahkamah Rayuan hanya menolak permohonan injunksi inter parte tetapi tidak dalam apa cara melepaskan atau mengetepikan perintah ex parte yang dibenarkan terdahulu. Mahkamah Tinggi dan Mahkamah Rayuan tidak H melaksanakan budi bicara mereka untuk membuat perintah mengarahkan taksiran ganti rugi. Fakta bahawa perintah ex parte telah luput selepas 21 hari, ini tidak bermaksud bahawa perayu-perayu secara automatik berhak mendapat ganti rugi (lihat perenggan 20).

(4) Persoalan tentang 'serious miscarriage of justice' tidak timbul jika I perayu-perayu telah mengambil langkah-langkah betul dalam menguatkuasakan akujanji tersebut berhubung ganti rugi sebagaimana dinyatakan dalam perintah ex parte terdahulu atas alasan bahawa perintah ex parte itu telah diberikan secara salah atau ia patut tidak diberikan langsung pada mulanya (lihat perenggan 24).

(5) Perintah ex parte boleh luput selepas 21 hari; bagaimanapun perayu-perayu masih boleh diteruskan untuk membuat permohonan selepas ia telah luput. Permohonan itu perlu disokong dengan afidavit sokongan. Jika permohonan itu dibenarkan dan perintah ex parte dilepaskan, dibatalkan atau diketepikan oleh mahkamah, perayu-perayu perlu kemudian membuktikan bahawa mereka telah mengalami ganti rugi akibat daripada perintah ex parte itu. Mahkamah akan kemudian memutuskan isu itu. Hakim kemudian akan terus untuk menyatakan kuantiti jumlah ganti rugi yang dialami semasa perbicaraan permohonan sama atau boleh membuat perintah bahawa ganti rugi ditaksirkan sama ada oleh dirinya atau oleh Pendaftar pada tarikh terkemudian. Hanya dengan perintah ini, bahawa perayu-perayu boleh mengeluarkan notis pelantikan untuk perbicaraan berhubung taksiran ganti rugi (lihat perenggan 25).]

Notes

For cases on striking out, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1727–1740.

Cases referred to

Afro Asia Shipping Co (PTE) Ltd v Haridass Ho & Partners [2003] 2 SLR 491, HC (refd)

Attorney General of Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274, CA (refd)

Boey Oi Leng (t/a Indah Reka Construction Trading) v Trans Resources Corporation Sdn Bhd [2001] MLJU 566; [2001] 4 AMR 4807, HC (refd)

Castro v Murray (1875) 10 Ex 213 (refd)

Cheltenham and Gloucester Building Society v Ricketts and others [1993] 4 All ER 276, CA (refd)

Dadourian Group International Inc and others v Simms and others [2009] All ER (D) 175, CA (refd)

Elias bin Mooin & Anor v Dato' Zainal bin Abidin Johari [1997] 5 MLJ 359; [1997] 3 CLJ 455, HC (refd)

Financiera Avenida v Shiblaq [1990] CA Transcript 973, CA (refd)

Gabriel Peter & Partners v Wee Chong Jin (Suing as a Firm) & Ors [1998] 1 SLR 374, CA (refd)

Goh Koon Suan v Heng Gek Kiau & Ors [1990] 1 SLR 1251, HC (refd)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11, CA (refd)

Lonrho plc v Fayed (No 5) [1993] 1 WLR 1489, CA (refd)

Malayan Banking Berhad v Gan Kong Yam [1972] 1 MLJ 32 (refd)

Murray v Epsom Local Board [1897] 1 Ch 35, Ch D (refd)

RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd [2002] 3 MLJ 2; [2002] 3 CLJ 83, CA (folld)

Riduan bin Yusof v Khng Thian Huat & Anor [2005] 2 SLR 188, CA (refd)

A *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Scang (as estate respresentative Soo Boon Kooi @ Saw Boon Kooy (deceased) & Ors* [2008] 1 MLJ 27; [2008] 1 CLJ 365, CA (folld)

Vernazza, Re [1959] 2 All ER 200, QBD (refd)

B *Yukong Line v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113, QBD (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(b), (d)

C **Appeal from**: Suit No D-22 (IP)–647 of 2002 (High Court, Kuala Lumpur)

SF Wong (Sri Dev Nair with him) (Sri Dev & Naila) for the appellants.

Mohd Arief Emran Arifin (Chew Kherk Ying and Azmimi with him) (Wong & Partners) for the respondent.

D

Ramly Ali JCA (delivering judgment of the court):

E

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge dated 22 April 2010 in allowing the respondent's application to strike out the

F appellants' notice of appointment for hearing of assessment of damages, pursuant to an undertaking given by the respondent (the plaintiff in the court below) in respect of an ex parte interlocutory injunction which was ultimately dismissed on an inter parte hearing.

G

FACTUAL BACKGROUND

[2] The respondent commenced an action on 2 May 2002 against the appellants for copyright infringement and passing off in relation to the use of

H the respondent's designs for the rain water gutter system by the appellants. On 14 May 2002 the respondent obtained an ex parte injunction order against the appellants with the usual undertaking as to damages pending the hearing of the inter parte interlocutory injunction application. The appellants' defence is that the respondent does not have the copyright in the design of the gutter system

I and that the design of the gutter system is not original.

[3] On 28 April 2003 the High Court dismissed the respondent's inter parte interlocutory injunction application and on 8 May 2008 the Court of Appeal dismissed the respondent's appeal against the said High Court order.

NOTICE OF APPOINTMENT FOR HEARING OF ASSESSMENT OF DAMAGES

[4] The appellants (the defendants at the court below) thereafter filed a notice of appointment for hearing of assessment of damages dated 3 December 2009 purportedly pursuant to the High Court Order and the Court of Appeal order, both of which are in respect of the dismissal of the respondent's application of an interlocutory injunction.

[5] The respondent, thereafter filed an application dated 17 February 2010 to strike out the appellants' said notice on the grounds that there was no order of the court directing assessment of damages and that the right to enforce an undertaking as to damages is discretionary and not automatic.

STRIKING OUT UNDER O 18 R 19 OF THE RHC

[6] The respondent's application for striking out is made pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of the High Court 1980 ie that the appellants' claim is scandalous, frivolous or vexatious and/or that it is otherwise an abuse of process of the court; and under the inherent jurisdiction of the court.

[7] Sub-paragraph (1)(b) of r 19, deals with pleading which is 'scandalous, frivolous or vexatious'; while sub-para (1)(d) of the same rule deals with 'an abuse of the process of the court'. In *Murray v Epsom Local Board* [1897] 1 Ch 35 it was held by the court that, 'scandalous' generally refers to matters which improperly cause derogatory light on someone, usually a party to an action, with respect to moral character or uses repulsive language (see also *Boey Oi Leng (t/a Indah Reka Construction Trading) v Trans Resources Corporation Sdn Bhd* [2001] MLJU 566; [2001] 4 AMR 4807 and *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11). The words 'frivolous or vexatious' generally refer to a groundless action or statement with no prospect of success, often raised to embarrass or annoy the other party to the action. In considering whether any proceedings were vexatious or frivolous, one is entitled to and ought to look at the whole history of the matter and it is not to be determined by whether the pleading discloses a cause of action or not (see *Attorney General of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274; and *Re Vernazza* [1959] 2 All ER 200). It was decided in the above cases that 'frivolous or vexatious actions mean cases which are obviously frivolous or vexatious or obviously unsustainable'.

[8] Raja Azlan Shah J (as HRH then was) had made the following observation in the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32:

A No precise legal definition can be found as yet, as to the meaning of 'no reasonable defence' or 'frivolous or vexatious' or 'tending to delay the fair trial or the action', but as can be observed a pleading will not be struck out under this rule 'unless it is not only demurrable but something worse than demurrable', that is, such that no legitimate amendment can save it from being demurrable: *per Chitty J, in Republic of Peru v Peruvian Guano Co.*

B

[9] Sub-paragraph (d) of the rule deals with pleading which is 'an abuse of the process of the court'. In *Castro v Murray* (1875) 10 Ex 213, the phrase 'abuse of the process of the court' had been described generally to refer to situation where
C the court's process is used for unlawful object and not for the actual purpose intended to achieve justice. It involves a process which is contrary to good order established by usage. In dealing with this sub-para (1)(d), the judge is entitled to look at the affidavit evidence, on the same principle applicable to sub-para (1)(b). Striking out is not appropriate when there is conflicting evidence in the
D affidavits. The judge can only determine and decide the issue in question by consideration of the undisputed facts.

[10] In short, the words 'frivolous or vexatious' under r 19(1)(b) refer to cases which are obviously unsustainable or wrong. The words connote
E purposelessness in relation to the process or a lack of seriousness or truth and a lack of bona fide; they also include proceedings where a party is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result (see *Goh Koon Suan v Heng Gek Kiau & Ors* [1990] 1 SLR 1251; *Afro Asia Shipping Co Ltd v Haridass Ho & Partners*
F [2003] 2 SLR 491; and *Riduan bin Yusof v Khng Thian Huat & Anor* [2005] 2 SLR 188).

[11] The phrase 'abuse of process' under r 19(1)(d) signifies that the process of the court must be used bona fide and properly and must not be abused. It
G includes consideration of public policy and interest of justice. The court will prevent any improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant
H circumstances of the case. If an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court (see *Gabriel Peter & Partners v Wee Chong Jin (Suing as a Firm) & Ors* [1998] 1 SLR 374 and *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489).

I

UNDERTAKING AS TO DAMAGES

[12] In the present case, the undertaking as to damages provided by the respondent in applying for the ex parte order is as follows:

AND UPON THE Plaintiff's Undertaking to abide by any Order this Court may make as to damages in the event the Court shall hereafter be of the opinion that the defendants shall have sustained any by reasons of this Order which the Plaintiff ought to pay

[13] The form of undertaking indicates that the court has discretion whether to enforce it at all and that discretion is not limited in any way. The undertaking is given to the court and not to the respondent. The respondent can ask the court to enforce it but has no right to its enforcement or any right to damages until the discretion is exercised in his favour and damages are awarded by the court (see *Cheltenham and Gloucester Building Society v Ricketts and others* [1993] 4 All ER 276).

[14] The present appeal before us, raises an important point affecting the practice of the court on the enforcement of undertaking as to damages given by the successful applicant for an ex parte interlocutory injunction when subsequently the said injunction was dismissed after an inter parte hearing.

[15] An 'undertaking as to damages' was basically explained by Peter Gibson LJ in *Cheltenham and Gloucester BS* as follows:

> The practice of requiring an undertaking in damages from the applicant for such an injunction as the price for its grant was originated by the court of Chancery as an adjunct to the equitable remedy of an injunction. There is an obvious risk of unfairness to a respondent against whom an interlocutory injunction is ordered at a time when the isues have not been fully determined and when usually all the facts have not been ascertained. The order might subsequently prove to have been wrongly made but in the meantime the respondent by reason of compliance with the injunction may have suffered serious loss from which he will not be compensated by the relief sought in the proceedings. The risk of such injustice is greater when the interlocutory injunction has been granted ex parte. The risk is particularly great with Mareva injunctions, granted as they are almost invariably ex parte, and frequently imposing severe restrictions on the respondents' right to spend their money or otherwise dispose of their assets: such injunctions can have the effect of ruining a thriving business or of otherwise causing substantial loss to the respondent and were vividly described by Donaldson LJ in *Bank Mellat v Nikpour* [1985] 2 FSR 87 at p 92 as being, with the Anton Filler order, one of the law's 'two nuclear weapons'. The courts are properly concerned lest these weapons are used inappropriately and the undertaking in damages provides a salutary potential deterrent against their misuse.

[16] The law on how to enforce an undertaking as to damages was stated quite clearly by Lloyd LJ (with whom Stocker LJ and Sir George Waller agreed) in *Financiera Avenida v Shiblaq* [1990] CA Transcript 973 as follows:

> Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction. Here ordinary principles of the law of contract apply both as to causation and as to quantum (per Lod Diplock in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 at p 1150; [1975] AC 295 at p 361) … In a simple case the trial judge may be able to deal, with causation and quantum he as soon as he has exercised his discretion. But in a more complicated case it may be necessary for him to order an inquiry as to damages either before himself, or before some other judge or before the master or registrar. Very occasionally he may find it necessary to leave over the exercise of the discretion.

[17] Based on the above principles as well the wordings of the undertaking in question (in the present case), we are of the view that the enforcement of the said understanding given by the respondent (the plaintiffs) in an ex parte interlocutory injunction is not automatic right of the respondent (the defendant) in the event the injunction is subsequently discharged. There must first be determination by the court that the undertaking ought to be enforced. There must be an order from the court as to damages for which the court may order damages summarily or direct an assessment thereof. Without such an order from the court, the undertaking cannot be enforced. The wordings of the undertaking itself clearly indicate that 'the court may make an order as to damages after the court has satisfied that the appellant shall have sustained the damages by reason of the ex parte injunction which the respondent ought to pay'. The enforcement of the undertaking is not automatic. The court may exercise its discretion and form an opinion that the appellants had sustained injury or damages as a result of the ex parte injunction.

[18] The clear terms of the undertaking in the present case are that the respondent (being the plaintiff/applicant in the ex parte order) is to abide by any order that may be made by the court. The word 'may' was used in the said undertaking. It reinforces the position that such an order directing an assessment of damages will not be granted as a matter of course. It is discretionary.

[19] In the English case *Dadourian Group International Inc and others v Simms and others* [2009] All ER (D) 175, the Court of Appeal in considering the principles applicable to discharge an injunction and the grant of permission

to enforce an undertaking as to damages cited the case of *Yukong Line v Rendsburg Investments Corp* [2001] 2 Lloyd's Rep 113 which established that:

> The question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged. The order for an inquiry as to damages is discretionary, such discretion being exercised in accordance with equitable principles, taking into account all the circumstances of the case …

[20] In the present case the High Court order and the Court of Appeal order had merely dismissed the inter parte injunction application but did not in any way discharge or set aside the ex parte order granted earlier. The High Court and the Court of Appeal did not exercise their discretion to make an order directing an assessment of damages. The appellants did not apply for the ex parte order to be discharged or set aside. The fact that the ex parte order lapsed after 21 days, does not mean that the appellants are automatically entitled to damages.

[21] On this issue we are in full agreement with the decision of the Court of Appeal in the case of *RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 2; [2002] 3 CLJ 83, where it was held:

> If the defendant wants to set aside the ex parte order, the defendant is at liberty to file an application for that purpose. It is at the hearing of that application that the court should decide whether to set it aside, if it has not lapsed. If in the meantime, the ex parte order has lapsed, the court should nonetheless hear the application, not for the purpose of determining whether to set it aside because it has lapsed, but for the purpose of determining whether it should have been made in the first place. This is necessary in order to determine whether damages should be awarded. The fact that an ex parte order lapses automatically after 21 days does not mean that the defendant is automatically entitled to damages. The question is should the ex parte order have been made at all? Only if it should not, then the order for assessment of damages should be made. That has not been decided. There was not even an application or that purpose.

[22] In order to enforce the said undertaking as to damages, the ex parte order in question must first be discharged or set aside by the court. The appellants should have made an application to that effect to the court. Such an application is essential for the purpose of determining whether the said ex parte order should or should not have been made in the first place. If the answer is in the negative, then such determination is essential to determine the issue of assessment of damages to be awarded to the other party who has suffered such damages. The appellants, without putting forward any application to discharge or set aside the ex parte order must have accepted that the said order was properly taken out. When this is so, they must be excluded from claiming

damages for the period when it existed (see *Elias bin Mooin & Anor v Dato' Zainal bin Abidin Johari* [1997] 5 MLJ 359; [1997] 3 CLJ 455).

[23] Learned counsel for the appellants complained that it took almost a year since the respondent (the plaintiff) obtained the ex parte injunction order on 14 May 2002 till the time when the inter parte application for injunction was finally dismissed on 28 April 2003; and it would be a serious miscarriage of justice if the appellants (the defendants) upon being victorious in the interlocutory inter parte injunction stage as well as the trial proper, is prohibited from enforcing the undertaking given by the respondent (the plaintiff).

[24] The question of 'serious miscarriage of justice' does not arise if the appellants (the defendants) had taken the correct steps in enforcing the said undertaking as to damages as stated in the earlier ex parte order on the ground that the ex parte order was wrongly granted or it should not have been granted at all in the first place.

[25] Proper procedure must be followed. The first step is for the appellants to make an application to the court to discharge, revoke or set aside the said ex parte order once the order is served on them. The ex parte order may have lapsed after 21 days; however the appellants can still proceed to make the application after it has lapsed. The application must be supported by an affidavit in support. If the application is allowed and the said ex parte order is discharged, revoked or set-aside by the court, the appellants must then establish that they have suffered damages as a result of the said ex parte order. The court will then decide on the issue. The judge may then proceed to quantify the amount of damages suffered at the hearing of the same application or may make an order that the damages be assessed either by himself or by the registrar at a later date. Only with this order, that the appellants can issue a notice of appointment for the hearing of assessment of damages.

[26] The court may have dismissed the respondent's application for inter parte injunction after hearing both parties, but that does not necessarily mean that the said ex parte order which had been made earlier ought not to have been granted in the first place. The appellants (as the defendants) can still apply for the said ex parte order be discharged, revoked or set aside.

[27] On this issue, we are in full agreement with the Court of Appeal in its decision in *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Scang (as estate respresentative Soo Boon Kooi @ Saw Boon Kooy (deceased) & Ors* [2008] 1 MLJ 27; [2008] 1 CLJ 365 where Mokhtar Sidin JCA stated:

> … with respect, the fact that the learned judge had dismissed the appellant's claims altogether does not necessarily mean that the said order of injunction ought not to have been granted in the first place. The need to establish, after trial, whether the injunction sought or ought not to have been granted is rather important, since the appellant would no doubt have satisfied the trial judge at the inter parte hearing on the criteria for an injunction pending trial following the principles of *American Cynamid*. Unless there had been an express finding on the part of the trial judge that the said order of injunction had not been rightly granted, which I am unable to find in his grounds of judgment, I do not think that the trial judge should have ordered damages to be assessed.

[28] In the present case before us, the appellants sought to proceed with the application for assessment of damages without first proceeding to discharge, revoke or set aside the ex parte injunction order on the ground that the same was wrongly granted. Clearly their action is against the flow of the legal principle on the issue as discussed above and therefore the application must fail.

CONCLUSION

[29] The appellants' application to issue a notice of appointment for the hearing of assessment of damages in the present case is clearly and obviously unsustainable and an abuse of the process of the court in the context of O 18 r 19(1)(b) and (d) of the RHC. The strength of the case can be argued sufficiently and conclusively on the affidavits available and the court is able come to a conclusion that it becomes plain and obvious that the case has no chance of success at all. The issue of law involved is unarguable and unsustainable; and the court can decide on the issue at the striking out application.

[30] The learned High Court judge was correct in exercising his discretion in striking out the appellants' notice of appointment for the hearing of assessment of damages in the present case before us. He had applied the correct principles of law governing the subject matter. We find no reason to interfere with his decision.

[31] We therefore unanimously dismiss the appeal with costs of RM5,000 to be paid to the respondent. We also make an order that the deposit be paid to the respondent on account of costs.

Appeal dismissed.

Reported by Afiq Mohamad Noor